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SERVICE DATE - JULY 6, 1999

SURFACE TRANSPORTATION BOARD[1]

DECISION

No. 41523

NATIONAL STARCH AND CHEMICAL CO.--PETITION FOR DECLARATORY ORDER--CERTAIN RATES AND PRACTICES OF EDSON EXPRESS, INC.

Decided: July 1, 1999

We find that the collection of undercharges sought in this proceeding would be an unreasonable practice under 49 U.S.C. 10701(a) and section 2(e) of the Negotiated Rates Act of 1993, Pub. L. No. 103-180, 107 Stat. 2044 (NRA) (now codified at 49 U.S.C. 13711). Accordingly, we will not reach the other issues raised in this proceeding.

BACKGROUND

This matter arises out of a court action in the United States District Court for the District of New Jersey in David E. Lewis, Trustee of the Estate of Edson Express, Inc., Debtor v. National Starch and Chemical Co., Civil Action No. 93-354 (MLP). The court proceeding was instituted by David E. Lewis, as Trustee for the bankruptcy estate of Edson Express Inc. (Edson or respondent), a former motor common and contract carrier, to collect undercharges from National Starch and Chemical Co. (National or petitioner). Edson seeks undercharges of $18,864.45, plus interest and costs, allegedly due, in addition to amounts previously paid, for services rendered in transporting 29 shipments of starch, adhesives, and related items between December 21, 1988, and January 21, 1991.[2] The shipments were less-than-truckload (LTL) movements transported from Edson's facility

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[1] The ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (the ICC Termination Act or the Act), which was enacted on December 29, 1995, and took effect on January 1, 1996, abolished the Interstate Commerce Commission (ICC) and transferred certain functions and proceedings to the Surface Transportation Board (Board). Section 204(b)(1) of the Act provides, in general, that proceedings pending before the ICC on the effective date of that legislation shall be decided under the law in effect prior to January 1, 1996, insofar as they involve functions retained by the Act. This decision relates to a proceeding pending with the ICC prior to January 1, 1996, and to functions that are subject to Board jurisdiction pursuant to 49 U.S.C. 13709-13711. While this decision generally applies the law in effect prior to the Act, new 49 U.S.C. 13711(g) provides that new section 13711 applies to cases pending as of January 1, 1996, and hence section 13711 will be applied to the factual situation presented in this proceeding. Unless otherwise indicated, citations are to the former sections of the statute.

[2] Respondent's court complaint also includes an originally assessed and assertedly unpaid shipment charge of $101.07. The claim for this shipment is based upon the originally billed charge

(continued...)

in North Kansas City, MO, to points in Colorado. By order dated August 19, 1994, the court stayed the proceeding and referred the issue of rate reasonableness to the ICC for resolution.

Pursuant to the court order, National, on January 6, 1995, filed a petition for declaratory order requesting the ICC to resolve issues of tariff applicability, unreasonable practice, and rate reasonableness. By decision served January 13, 1995, a procedural schedule was established for the submission of evidence on non-rate reasonableness issues. On April 24, 1995, petitioner filed its opening statement. Respondent filed its reply on June 25, 1995, and National submitted its rebuttal on July 19, 1995.

Petitioner asserts that respondent's originally billed charges were based upon discounted rates that were mutually agreed upon and set forth in a tariff. National further maintains that, for each of the subject shipments, it executed the original bill of lading section 7 "non-recourse" provision that relieves petitioner of additional liability for undercharges;[3] that respondent's attempt to collect undercharges here constitutes an unreasonable practice under section 2(e) of the NRA; and that the rates respondent now seeks to assess are unreasonable.

National supports its assertions with an affidavit from Michael Bange, president of Champion Transportation Services, Inc., a transportation consultant retained by petitioner who conducted an audit and analysis of the balance due bills and claims of respondent. Attached as Exhibit A to Mr. Bange's affidavit are copies of the balance due bills issued on behalf of respondent that reflect originally issued freight bill data[4] as well as revised balance due amounts. Mr. Bange states that Edson originally billed, and National paid, charges for the subject shipments based on class rates less a 45% discount. He asserts that Item 1306 of tariff EDSN 601-F, which provides for the application of a 45% discount on shipments moving between Kansas City, MO, and points in Colorado (Exhibits D, E, and F), was published specifically by Edson to apply to National's traffic (Exhibits E, F, and G). Mr. Bange maintains that, as reflected in Exhibits A, K, and M, respondent offered a discounted freight rate to petitioner, and petitioner relied upon the offered negotiated discount rate in tendering the subject traffic to respondent.

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[2](...continued)
and is not an undercharge claim requiring Board action.

[3] The section 7 "non-recourse" provision of the bill of lading contains the following directive:

> The carrier shall not make delivery of this shipment without payment of freight and all other lawful charges.

Execution of this provision relieves the shipper consignor of additional liability for freight charges upon delivery of the shipment to the consignee.

[4] Certain of the balance due bills contain original freight bill data that are illegible and/or incomplete.

Respondent contends that the balance due amounts set forth in the revised freight bills reflect the only correct reading of the applicable tariff and that petitioner's section 7 argument is not supported by fact or law. It argues that National has not provided a sufficient factual basis to sustain its unreasonable practice claim in that it has failed to furnish written evidence of the original rate charged or to establish that petitioner reasonably relied on that rate. Finally, respondent argues that section 2(e) of the NRA may not be applied retroactively and is unconstitutional.[5]

Edson supports its position with an affidavit from R. E. Stulting, a rate auditor for Delta Transportation Service, Inc., the organization that conducted an audit of Edson's freight bills. Mr. Stulting asserts that, based on the applicable tariff, the discounts applied in the original freight bills were improperly applied to those shipments weighting 20,000 pounds or more[6] and that shipments weighing less than 20,000 pounds should have been rated at their actual weight. The subject shipments were accordingly rerated to conform with the stated weight considerations.[7] Mr. Stulting also maintains that the Section 7 "non-recourse" provisions of the bills of lading are not applicable

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[5] We point out that six federal circuit courts of appeals and virtually every other federal court that has considered respondent's applicability arguments have determined that the remedies provided in section 2 of the NRA apply to the undercharge claims of bankrupt carriers such as Edson. See Whitaker v. Power Brake Supply, Inc., 68 F.3d 1304 (11th Cir. 1995) (Power Brake); Jones Truck Lines, Inc. v. Whittier Wood Products, Inc., 57 F.3d 642 (8th Cir. 1995) (Whittier Wood); In the Matter of Lifschultz Fast Freight Corporation, 63 F.3d 621 (7th Cir. 1995); In re Transcon Lines, 58 F.3d 1432 (9th Cir. 1995) cert. denied, 116 S. Ct. 1016; In re Bulldog Trucking, Inc., 66 F.3d 1390 (4th Cir. 1995); Hargrave v. United Wire Hanger Corp., 73 F.3d 36 (3d Cir. 1996); see also, e.g., Jones Truck Lines, Inc. v. AFCO Steel, Inc., 849 F. Supp. 1296 (E.D. Ark. 1994).

Further, as the courts have also held consistently, section 2(e), by its own terms and as more recently amended by the ICC Termination Act, may be applied retroactively against the undercharge claims of defunct, bankrupt carriers that were pending on the NRA's enactment. See, e.g., Jones Truck Lines, Inc. v. Scott Fetzer Co., 860 F. Supp. 1370, 1375-76 (E.D. Ark. 1994); North Penn Transfer, Inc. v. Stationers Distributing Co., 174 B.R. 263 (N.D. Ill. 1994); Gold v. A.J. Hollander Co. (In re Maislin Indus.), 176 B.R. 436 (Bankr. E.D. Mich. 1995); cf. Jones Truck Lines, Inc. v. Phoenix Products Co., 860 F. Supp. 1360 (W.D. Wisc. 1994).

[6] Edson does not dispute that Item 1306 of Tariff EDSON 601-F provided National with a 45% discount for its shipments moving from Kansas City. However, it argues that this provision is subject to EDSON 100-B, Item 648, which provides that the discount does not apply where rates are based on minimum weights of 20,000 pounds or more.

[7] The shipments at issue were all originally rated using rates applicable at the 20,000 pound minimum weight level and discounted by 45%. The actual weights of the shipments ranged from less than 15,000 pounds to over 45,000 pounds. Mr. Stulting rerated the shipments weighing less than 20,000 pounds using published rates applicable at a minimum weight level of 15,000 pounds, to which was applied a 45% discount. The shipments which weighed 20,000 pounds or more were rerated at appropriate minimum weight levels, with no discounts.

to prepaid shipments[8] and that shipper remains liable for any undercharges which occur as a result of failure to pay the filed rate.

DISCUSSION AND CONCLUSIONS

We dispose of this proceeding under section 2(e) of the NRA. Accordingly, we do not reach the other issues raised.[9]

Section 2(e)(1) of the NRA provides, in pertinent part, that "it shall be an unreasonable practice for a motor carrier of property . . . providing transportation subject to the jurisdiction of the [Board] . . . to attempt to charge or to charge for a transportation service . . . the difference between the applicable rate that [was] lawfully in effect pursuant to a [filed] tariff . . . and the negotiated rate for such transportation service . . . if the carrier . . . is no longer transporting property . . . or is transporting property . . . for the purpose of avoiding application of this subsection."[10]

It is undisputed that Edson no longer transports property.[11] Accordingly, we may proceed to determine whether Edson's attempt to collect undercharges (the difference between the applicable filed tariff rate and the negotiated rate) is an unreasonable practice.

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[8] The subject shipments were all identified as prepaid shipments.

[9] We note that section 2(e)'s availability is not limited to situations where the originally billed rate was unfiled; nor is its use precluded where the originally billed rate was based on a filed rate that for some reason can be determined to be inapplicable. Rather, in evaluating whether a carrier's collection efforts would be an "unreasonable practice" under section 2(e), the Board must consider, inter alia, whether the shipper was offered a rate by the carrier "other than the rate legally on file with the Board for the transportation service." Section 2(e)(2)(A) (emphasis added). If the carrier and shipper agreed to a price that was embodied in a filed rate that cannot be applied to the involved shipments, then the shipper was offered a rate not legally on file "for [that] transportation service." Thus, even if "some of [a carrier's undercharge claims] are based on it billing and collecting an erroneous [filed rate], if the so-called erroneous rate was negotiated between the shipper and [carrier] and if the shipper reasonably relied on the rate, the rate would meet the definition of a 'negotiated rate' and trigger the application of the provisions of the NRA." American Freight Systems, Inc. v. ICC, 179 B.R. 952, 957 (Bankr. D. Kan. 1995).

[10] The ICC Termination Act removed the limitation that made section 2(e) of the NRA applicable only to transportation service provided prior to September 30, 1990. Thus, the remedies in section 2(e) may be invoked for all the shipments at issue in this proceeding, including those shipments transported after September 30, 1990.

[11] Federal Highway Administration records indicate that Edson's contract and common carrier operating authorities were revoked in 1991.

Initially, we must address the threshold issue of whether sufficient written evidence of a negotiated rate agreement exists to make a section 2(e) determination. Section 2(e)(6)(B) defines the term "negotiated rate" as one agreed on by the shipper and carrier "through negotiations pursuant to which no tariff was lawfully and timely filed . . . and for which there is written evidence of such agreement." Thus, section 2(e) cannot be satisfied unless there is written evidence of a negotiated rate agreement.

Here, the record contains copies of the balance due bills issued on behalf of respondent that indicate originally assessed charges to which discounts of 45% were applied as well as copies of Item 1306 of tariff EDSN 601-F that provide for the application of a 45% discount to the shipments of petitioner involved in this proceeding. We find this evidence sufficient to satisfy the written evidence requirement. E.A. Miller, Inc.--Rates and Practices of Best, 10 I.C.C.2d 235 (1994). See William J. Hunt, Trustee for Ritter Transportation, Inc. v. Gantrade Corp., C.A. No. H-89-2379 (S.D. Tex. March 31, 1997) (finding that written evidence need not include the original freight bills or any other particular type of evidence, as long as the written evidence submitted establishes that specific amounts were paid that were less than the filed rate and that the rates were agreed upon by the parties).

In this case the evidence indicates that the parties conducted business in accordance with agreed-to negotiated discount rates that were originally billed by Edson and paid by National. The consistent application in the original freight bills of freight charges based on 20,000 pound minimum weight rate levels to which a 45% discount was applied supports petitioner's contentions and reflects the existence of negotiated rates. The evidence further indicates that National relied upon the agreed-to discount rates in tendering its traffic to Edson.

In exercising our jurisdiction under section 2(e)(2), we are directed to consider five factors: (1) whether the shipper was offered a transportation rate by the carrier other than the rate legally on file [section 2(e)(2)(A)]; (2) whether the shipper tendered freight to the carrier in reasonable reliance upon the offered rate [section 2(e)(2)(B)]; (3) whether the carrier did not properly or timely file a tariff providing for such rate or failed to enter into an agreement for contract carriage [section 2(e)(2)(C)]; (4) whether the transportation rate was billed and collected by the carrier [section 2(e)(2)(D)]; and (5) whether the carrier or the party representing the carrier now demands additional payment of a higher rate filed in a tariff [section 2(e)(2)(E].

Here, the evidence establishes that a negotiated rate was offered to National by Edson; that National, reasonably relying on the offered rate, tendered the subject traffic to Edson; that the negotiated rate was billed and collected by Edson; and that Edson now seeks to collect additional payment based on a higher rate. Therefore, under 49 U.S.C. 10701(a) and section 2(e) of the NRA, we find that it is an unreasonable practice for Edson to attempt to collect undercharges from National for transporting the shipments at issue in this proceeding.

This decision will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. This proceeding is discontinued.

2. This decision is effective on the service date.

3. A copy of this decision will be mailed to:

Honorable Mary Little Parell
United States District Court
for the District of New Jersey
U.S. Courthouse
402 East State Street
Trenton, NJ 08608

Re: Civil Action No. 93-354 (MLP)

By the Board, Chairman Morgan, Vice Chairman Clyburn and Commissioner Burkes.

Vernon A. Williams
Secretary